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Supreme Court, U.S.
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No. 99-2035

IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF ARTHUR F. McEVOY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the federal appellate courts should apply in the punitive damages context the standard of appellate review that traditionally has been used in both criminal and civil litigation when one party argues that the result reached by the jury is not sustainable under the relevant law on the particular record of the case: the "rational factfinder" standard.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae, Arthur F. McEvoy, is a law professor who appeared as an *amicus* in the last major case in which this Court grappled with the proper scope of federal appellate review of jury damage awards, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). He served as lead counsel on an *amicus* brief cited by this Court in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 422 n.2 (1994). His qualifications are listed in the Appendix.[1]

Amicus filed a brief at the certiorari stage of this case urging review of the conflict among the federal circuit courts of appeals regarding the proper scope of appellate review for jury-awarded punitive damages. That brief framed the question presented as "whether to apply in the punitive damages context the standard of appellate review that has traditionally been used in all other contexts — in both criminal litigation and civil litigation alike — when one party argues that the result reached by the jury is not sustainable on the particular record of the case." Brief of Erwin Chemerinsky and Arthur F. McEvoy as *Amici Curiae* in Support of Petitioner, filed Aug. 3, 2000 ("Cert. *Amicus* Br."), at 1.

In particular, *amicus* argued that in reviewing substantive due process attacks on jury-awarded punitive damages, federal appellate courts should apply the "rational factfinder" standard set out in *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979), drawing all reasonable inferences in favor of the jury's verdict, but affording no deference to the district court's analysis of the matter. He demonstrated that this standard has been consistently employed by this Court and the lower federal courts to measure a jury verdict's conformity with applicable law not simply concerning criminal liability (at issue in *Jackson*), but also concerning civil liability and civil damages and penalties, including compensatory damages and punitive damages. Cert. *Amicus* Br. at 4-12.

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae* and his counsel, made a monetary contribution to the preparation or submission of this brief.

This position has been criticized in the brief of petitioner Cooper Industries, Inc. ("Cooper"), and in two *amicus* briefs filed in support of Cooper submitted by counsel who represented the defendants in the last three punitive damages cases heard by this Court. *See* Pet. Br. at 26 & n.20; Brief for the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner ("Chamber of Commerce Br.") (submitted by Andrew L. Frey) at 9-21; Brief of *Amicus Curiae* The Association of American Railroads in Support of Petitioner "(Railroads Br.") at 24-27 (submitted by Carter G. Phillips). This brief answers those criticisms.

In the view of *amicus*, due process is fully satisfied, and the distinct roles of the trial judge and appellate judge in reviewing jury verdicts are appropriately respected, by adherence in the punitive damages context to the "rational factfinder" standard that is traditionally used on appeal when the loser of a jury trial argues that the result reached by the jury violates applicable law. On a substantive due process challenge to a punitive damage award such as that made by Cooper in this case, appellate judges should leave evaluation of the weight of the evidence to the jury and trial judge. Thus, an appellate attack on the size of any jury verdict should be evaluated using an objective, "bottom-line test" under which "the verdict is evaluated against the evidence" to determine if it is "rational." *Outboard Marine Corp. v. Babcock Indus., Inc.*, 106 F.3d 182, 186 (7th Cir. 1997) (Posner, C.J.). This test is used by most federal appellate courts that have addressed the issue, *see* Cert. *Amicus* Br. at 4-6, as Cooper and its *amici* have not disputed.

Any other course would seriously disrupt the existing framework for federal judicial review of jury verdicts. In particular, granting the request for appellate scrutiny of jury verdicts that is more intrusive than the "rational factfinder" standard would engage the federal appellate courts in weight-of-the-evidence review of jury verdicts that is forbidden by the Seventh Amendment, that has never been authorized by Congress, and that would be enormously inefficient.

ARGUMENT

I. THE "RATIONAL FACTFINDER" STANDARD IS THE PROPER STANDARD FOR APPELLATE REVIEW OF WHETHER A JURY'S PUNITIVE DAMAGE AWARD VIOLATES FEDERAL SUBSTANTIVE DUE PROCESS

At the certiorari stage, *amicus* noted that the federal circuit courts of appeals have articulated three different approaches to the appellate review standard for a substantive due process objection to a punitive damage award. Six circuits appear to have specifically addressed this issue. Four of the circuits use a standard akin to the "rational factfinder" standard articulated in *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979), asking whether the amount of the award is rationally supportable on the record. *See* Cert. *Amicus* Br. at 4-6 (citing *Strauss v. Stratojac Corp.*, 810 F.2d 679, 686 (7th Cir. 1987); *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259, 1266 (8th Cir.), *cert. denied*, 513 U.S. 989 (1994); *Lee v. Edwards*, 101 F.3d 805, 808-13 (2d Cir. 1996); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 642-43 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997)). This is the view that *amicus* defends.

Another approach, adopted solely by the Eleventh Circuit, involves a curious hybrid review standard. It combines the *Jackson* "rational factfinder" test with deference to any findings made by the district court on posttrial review of the substantive due process issue. Any such findings are treated as if they had been made in a bench trial, so that they are reversible on appeal only if found "clearly erroneous" within the meaning of Fed. R. Civ. P. 52(a). *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1334 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999). As *amicus* has pointed out, *see* Cert. *Amicus* Br. at 13-15, this hybrid review standard is conceptually inappropriate, and this Court has rejected a proposed borrowing of the Rule 52(a) standard in another context involving review of jury verdicts. *Sawyer v. Whitley*, 505 U.S. 333, 346 n.14 (1992). This standard is also pragmatically indefensible, risking both erroneous approval of irrational jury verdicts and undue interference with

rational jury verdicts. Neither Cooper nor its *amici* answer these objections, or advocate the Eleventh Circuit's approach; indeed, *Johansen* is not even cited in Cooper's brief.[2]

Instead, the alternative to *Jackson*'s "rational factfinder" standard being urged on this Court is the third approach followed in the lower federal courts: the approach recently adopted by the Third Circuit in *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 791 (2000). Under this approach, federal appellate judges play "[t]he role of gatekeeper" over sizable punitive damage awards and decide what is "the proper, reasonable, punitive damages award" with little if any deference to the jury or the district judge. *Id.* at 450, 468. *See also* Cert. *Amicus* Br. at 15-16. Cooper and several of its *amici* advance this approach.[3] Their arguments are flawed in several key respects.

A. The "Rational Factfinder" Standard Is the Tool Traditionally Used by Appellate Courts to Ensure That Jury Verdicts Comply With Substantive Law

Cooper and its *amici* contend that the "rational factfinder" standard is utterly inapposite in a case such as this, involving

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[2] Two of the ten *amicus* briefs filed in support of Cooper discuss in passing the review standard set out in *Johansen*, but neither brief addresses the two basic objections of *amicus* to *Johansen* that were set out at the certiorari stage, as just summarized. *See* Chamber of Commerce Br. at 21, 25-27; Brief *Amicus Curiae* of Product Liability Advisory Council, Inc., in Support of Petitioner ("PLAC Br.") at 15-16.

[3] For example, one of the *amicus* briefs, urging "the need for meaningful appellate scrutiny" of punitive damage awards, cites the Third Circuit's *Inter Medical Supplies* decision in support of the argument that "little deference to trial courts or juries" is owed in this context. Chamber of Commerce Br. at 3, 21 (citing 181 F.3d at 469). *See also* Pet. Br. at 13, 26 n.20 (arguing for "rigorous appellate review" of punitive damage verdicts and rejecting the "rational factfinder" test); Railroads Br. at 18, 25-27 (arguing that appellate courts must conduct a "rigorous and independent evaluation" of the size of a punitive damage verdict and rejecting the "rational factfinder" test).

appellate review of Cooper's substantive due process argument that the jury's punitive damage award is too large. In their view, the "rational factfinder" standard "is a sufficiency-of-the-evidence standard for criminal trials under the Due Process Clause" that "is simply a fish out of water" in this context. Railroads Br. at 25, 27. *See also* Pet. Br. at 26 n.20 (objecting to proposal "modeled after the test governing evidentiary sufficiency challenges to criminal convictions"); Chamber of Commerce Br. at 11 (arguing that to use "*Jackson*'s rational juror standard" in this context "is misguided" because "it is not possible to tell what facts (if any) the jury found in setting an amount of punitive damages or what relative weight it gave to any facts that may have been found").

To the contrary, the "rational juror" standard, which calls for an objective analysis of the record evidence under the governing substantive law of damages, is perfectly suited to appellate review of objections to the size of a jury's damage award, a matter that Chief Judge Posner has given careful attention in several decisions dating back to 1983. The Chamber of Commerce is correct in observing (at 11) that where the jury renders a general verdict awarding damages, it is not possible to tell what particular facts the jury found, or what relative weight it gave to the facts it found. But this circumstance is precisely what calls for use of the "rational juror" standard. "It is a commonplace that a jury verdict must be reviewed in relation to the record before it." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J., concurring) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).

> The law neither requires juries to state reasons for their verdicts nor permits courts to inquire into the reasoning process of the jurors for the purpose of impeaching their verdict. . . . The law applies a bottom-line test: the verdict is evaluated against the evidence, rather than against the likelihood that the jury arrived at the verdict by the "rational" process that a judge would employ. It is enough (this is implicit in the bottom-line test) that a

> rational jury could have come to such a verdict . . .; it is a test of the reasonableness of the result rather than the reasonableness of the process that led to the result.

Outboard Marine Corp. v. Babcock Indus., Inc., 106 F.3d 182, 186 (7th Cir. 1997) (Posner, C.J.) (citations omitted). Under this standard, as long as a jury verdict is "neither absurdly high nor absurdly low," it will be upheld on appeal. *Id.* at 186-87. *See also Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000) (Posner, C.J.); *Kasper v. St. Mary of Nazareth Hosp.*, 135 F.3d 1170, 1176-77 (7th Cir. 1998) (Posner, C.J.); *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 971 (7th Cir. 1983) (Posner, J.).

Chief Judge Posner is hardly alone in this view. As already noted, *see* Cert. *Amicus* Br. at 4-6, 8-9, 11-12, there is ample precedent both from this Court and from the lower federal appellate courts for using the "rational factfinder" standard to judge a jury verdict's conformity with applicable law in civil litigation on both liability and damages, including punitive damages. Cooper and its *amici* largely ignore this precedent.

To be sure, the "rational factfinder" label originated in the criminal law context, in which the validity of the substantive result reached by a jury is frequently challenged by defendants. In *Jackson v. Virginia*, 443 U.S. 307 (1979), this Court held that where a defendant challenges the adequacy of the evidence introduced at trial, the proper test on appellate review (and on habeas review of state court proceedings) is whether "a rational factfinder" could have arrived at the jury's result under the governing law and facts. *Id.* at 317-20, 324. *Jackson*'s "rational factfinder" test is an objective one that focuses on the corpus of evidence that was before the jury. It "does not permit a court to make its own subjective determination of guilt or innocence," nor does it concern "how rationally the verdict was actually reached" based on "scrutiny of the reasoning process actually used by the factfinder — if known." *Id.* at 319-20 n.13.

"This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to

weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts," thus "imping[ing] upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* at 319. The question it poses to a reviewing court is simple. "Under *Jackson*, the question whether the trier of fact has power to make a finding of guilt requires a binary response: Either the trier of fact has power as a matter of law or it does not." *Schlup v. Delo*, 513 U.S. 298, 330 (1995).

Jackson involved the review of evidentiary sufficiency to sustain a criminal conviction, but a close variant of the *Jackson* standard has traditionally applied to appellate review of liability determinations in civil litigation as well. This Court articulated the general approach decades ago as follows:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict.

Brady v. Southern Ry., 320 U.S. 476, 479-80 (1943).

This Court introduced *Jackson*'s "rational factfinder" language into the summary judgment context in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), stating that, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial,'" and emphasizing that the inferences that may be drawn from the facts must be "'viewed in the light most favorable to'" the nonmovant. *Id.* at 587 (citations omitted). This Court held just last Term that the same test applies in reviewing a motion for judgment as a matter of law, in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), which calls for analysis of whether "no rational factfinder could" find as did the jury. *Id.* at 2109. In doing so, this Court clarified that under the "rational factfinder" standard, "the court

should review all of the evidence in the record," but it "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* at 2110. In civil litigation, the lower federal appellate courts routinely refer to the "rationality" of a finding of liability when they analyze the record evidence in reviewing district court rulings on motions for summary judgment and judgment as a matter of law.[4]

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[4] *See, e.g., Favorito v. Pannell*, 27 F.3d 716, 719 (1st Cir. 1994); *Alvarez-Crespo v. Olavarria-Rivera*, 994 F.2d 35, 36 (1st Cir. 1993); *This is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2d Cir. 1998); *Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105, 107-08 (2d Cir. 1997); *United States v. 121 Allen Place*, 75 F.3d 118, 120-21 (2d Cir. 1996); *Doby v. Decrescenzo*, 171 F.3d 858, 873-74 (3d Cir. 1999); *In re Merritt Logan, Inc.*, 901 F.2d 349, 366 (3d Cir. 1990); *Roebuck v. Drexel University*, 852 F.2d 715, 730 (3d Cir. 1988) (Becker, J.); *Smith v. American Nat'l Red Cross*, 1992 WL 357850, at *2 (4th Cir. 1992); *Thomas v. Texas Dep't of Crim. Justice*, 220 F.3d 389, 392 (5th Cir. 2000); *Waymire v. Harris County*, 86 F.3d 424, 428 (5th Cir. 1996); *Gulf South Medical & Surgical Inst. v. Aetna Life Ins. Co.*, 39 F.3d 520, 521 (5th Cir. 1994), *cert. denied*, 516 U.S. 814 (1995); *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 187 (5th Cir. 1995); *Premier Bank v. Mosbacher*, 959 F.2d 562, 566 (5th Cir. 1992); *Buntin v. Breathitt County Bd. of Educ.*, 134 F.3d 796, 800 (6th Cir. 1998); *Pitts v. Michael Miller Car Rental*, 942 F.2d 1067, 1069-70 (6th Cir. 1991); *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229 (6th Cir. 1990); *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 498 (7th Cir. 2000) (Easterbrook, J.); *Tuohey v. Chicago Park Dist.*, 148 F.3d 735, 740 (7th Cir. 1998); *Pierce v. Atchison T. & S.F. Ry.*, 110 F.3d 431, 438 (7th Cir. 1997); *Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812, 815 (7th Cir. 1994) (Posner, C.J.); *In re Wade*, 969 F.2d 241, 248 (7th Cir. 1992); *Gremmels v. Tandy Corp.*, 120 F.3d 103, 105 (8th Cir. 1997); *Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1179 (9th Cir. 1999); *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) (Kozinski, J.), *cert. denied*, 515 U.S. 1159 (1995); *Taylor v. List*, 880 F.2d 1040, 1044-45 (9th Cir. 1989); *Davis v. United States Postal Serv.*, 142 F.3d 1334, 1341 (10th Cir. 1998); *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters., Inc.*, 112 F.3d 1119, 1121 (11th Cir. 1997); *T. Harris Young & Assocs., Inc. v. Marquette Electronics, Inc.*, 931 F.2d 816, 821, 828 (11th Cir.), *cert. denied*, 502 U.S. 1013 (1991).

The "rational factfinder" standard also appears at the penalty stage in criminal proceedings. For example, in the capital punishment context, in deciding whether the record supports a finding of a particular death-qualifying "aggravating circumstance," the "appropriate standard of review is the 'rational factfinder' standard established in *Jackson*." *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990). *See also id.* at 781-84; *Sawyer v. Whitley*, 505 U.S. 333, 339-41, 345-47 & n.14 (1992) (citing *Jackson* in reference to the "innocent of death" doctrine in the context of successive habeas claims).

In a related vein, in reviewing whether particular criminal sentences are in violation of the Eighth Amendment's ban on "cruel and unusual punishments," this Court treats the issue as "legal" in nature, reviewable *de novo*, with no particular deference to the trial court's view of the matter. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 961, 985-90, 994-96 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.); *id.* at 996, 1001-08 (opinion of Kennedy, J., joined by O'Connor and Souter, JJ.); *Solem v. Helm*, 463 U.S. 277, 283, 290-300, 303 (1983); *Rummel v. Estelle*, 445 U.S. 263, 275-82 (1980); *Gore v. United States*, 357 U.S. 386, 393 (1958); *Weems v. United States*, 217 U.S. 349, 362-68, 377, 380-82 (1910).[5] The Court has adopted a similar review standard with respect to criminal forfeitures. *United States v. Bajakajian*, 524 U.S. 321, 336-37 & n.10 (1998).

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[5] The federal circuit courts of appeals have understood that the review of Eighth Amendment challenges is to be conducted *de novo*. *See, e.g., United States v. Flowal*, 163 F.3d 956, 963 (6th Cir. 1998), *cert. denied*, 526 U.S. 1093 (1999); *Windham v. Merkle*, 163 F.3d 1092, 1106 (9th Cir. 1998); *United States v. DeLuca*, 137 F.3d 24, 40 n.19 (1st Cir.), *cert. denied*, 525 U.S. 874 (1998); *Leslie v. Doyle*, 125 F.3d 1132, 1134 (7th Cir. 1997); *United States v. Quinn*, 123 F.3d 1415, 1425 (11th Cir. 1997), *cert. denied*, 523 U.S. 1012 (1998); *United States v. Angulo-Lopez*, 7 F.3d 1506, 1509-10 (10th Cir. 1993), *cert. denied*, 511 U.S. 1041 (1994).

In reviewing whether particular instances of civil fines are constitutionally excessive, this Court has also treated the issue as "legal" in nature and reviewable *de novo*, with no particular deference to the views of lower courts or administrative agencies concerning the ultimate constitutional issue of excessiveness. *See, e.g., St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915); *Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340, 347, 349-51 (1913); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111-12 (1909).

Likewise, the "rational factfinder" standard has long been used by the lower federal appellate courts in reviewing attacks on the size of a jury's compensatory damage award. Even during the 1960s, when the existence of any federal appellate authority to review excessiveness claims was a matter of considerable dispute,[6] the Fifth Circuit emphasized that the function of appellate review in this context was to decide whether the district court had abused its discretion in upholding a verdict that was without rational support on the record. In *Glazer v. Glazer*, 374 F.2d 390 (5th Cir.) (Wisdom, J.), *cert. denied*, 389 U.S. 831 (1967), the court struck down a $1.9 million compensatory award for breach of contract. In doing so, it stated that the district court had abused its discretion because "[t]he verdict was excessive *as a matter of law* in that it exceeds any *rational* appraisal or estimate of the damages that could be based upon the evidence before the jury." *Id.* at 413 (emphasis added).[7] At least several

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[6] *See, e.g., Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 446-48 & n.3 (8th Cir.) (Blackmun, J.), *cert. denied*, 369 U.S. 929 (1961). *See also* Brief of Federal Jurisdiction and Legal History Scholars Akhil Reed Amar, et al., as *Amici Curiae* in Support of Petitioner, in *Gasperini v. Center for Humanities*, No. 95-719 (filed March 1, 1996) (hereinafter "*Gasperini Amicus* Br.") at 6-11.

[7] A linkage between the "abuse of discretion" label for review of an order on a motion for a new trial and the "rational factfinder" substance of the review of a compensatory damages award has persisted to this day. *See, e.g., Mejias-Quiros v. Maxxam Prop. Corp.*, 108 F.3d 425, 427-29 (1st Cir. 1997)

circuits currently apply the "rational factfinder" standard in reviewing attacks on the size of a jury's compensatory damage verdict. *See Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 201-02 n.21 (4th Cir. 2000); *Smith v. Kmart Corp.*, 177 F.3d 19, 29-30 (1st Cir. 1999); *Anthony v. G.M.D. Airline Servs., Inc.*, 17 F.3d 490, 493 (1st Cir. 1994); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 517 (7th Cir. 1993); see also pp. 5-6, *supra* (Seventh Circuit).

Finally, as already noted, in the review of attacks on the size of jury-awarded punitive damages, most lower federal appellate courts that have explicitly addressed the issue use the "rational factfinder" standard. See pp. 3-4, *supra*. This approach has solid support in this Court's decisions during the past decade

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(stating that under the abuse-of-discretion review standard set out in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), a district court's denial of a new trial on damages will be overturned "only if the damages awarded lack 'a rational basis in evidence,'" and concluding that the $25,000 award for medical expenses "lacked any rational basis" in the record) (citation omitted); *Air Safety, Inc. v. Roman Catholic Archbishop*, 94 F.3d 1, 4 (1st Cir. 1996) (stating that the proper scope of review "is narrow" and that "an abuse of discretion" cannot be found where "the jury award has a rational basis in evidence") (citation omitted).

Amicus agrees with the analysis of one of Cooper's *amici* that it is the substance of the appellate review standard, not the label, that matters. *See* Railroads Br. at 15, 17-18. The disagreement is over what the substance of that review should be. The Railroads Br. at 18, 25-27, argues that, in substance, a federal appellate judge should conduct a "rigorous and independent evaluation" of the size of a punitive damage verdict. The view of *amicus* is that such review involves a prohibited reweighing of the evidence, and that the substance of appellate review must be limited to an analysis of whether a rational factfinder could on the trial record have awarded the amount of punitive damages awarded by the jury, under the guideposts identified in *BMW v. Gore* and other legal considerations. If *amicus* is correct, what label is attached to such review is not particularly important. As Judge Easterbrook has suggested in a somewhat similar context, when the bottom-line issue is the rationality of the jury's verdict on the record evidence, a judge might "take Occam's Razor and slice off unnecessary steps and proceed directly to the question whether the evidence would permit a rational trier of fact to conclude" as did the jury. *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712 (7th Cir. 1997).

addressing federal substantive due process challenges to punitive damage awards. In all three cases, the Court reviewed the "gross excessiveness" issue just as it reviews issues raised by summary judgment motions or motions for judgment as a matter of law (most recently illustrated by last Term's *Reeves* decision): as a "legal" one, reviewable with the record read in the light most favorable to the jury's verdict, with no particular deference to the views of the lower courts. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-86 (1996); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458-62 (1993) (plurality opinion); *Pacific Mutual Life Ins. Co. v. Haslip*, 400 U.S. 1, 12, 18-24 (1991).

Further, in a decision holding that some degree of judicial review of the size of punitive damage awards is required by the Due Process Clause of the Fourteenth Amendment, this Court strongly implied that *Jackson*'s "rational factfinder" standard is the appropriate standard for reviewing "gross excessiveness" claims. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 & n.10 (1994) (citing *Jackson*, 443 U.S. at 324). Indeed, review of a jury verdict's rationality under the *Jackson* standard is exactly the standard that the petitioner in *Oberg* sought to have instituted. Tr. of Oral Argument in *Honda Motor Co. v. Oberg*, No. 93-644 (Apr. 20, 1994), 1994 U.S. Trans. LEXIS 150, at *13-14 (questioning by Justice O'Connor as to "why should the constitutionally mandated review be any more than is required in a criminal case" under "the *Jackson* standard," leading petitioner's counsel Andrew L. Frey to state: "I have no problem with that standard. That's what we would like to see the Court supply.").

The position that a "rational factfinder" standard governs appellate review of punitive damage awards was also advanced in one of the principal *amicus* briefs filed on behalf of the petitioner in *Oberg*, submitted by the late Dean Griswold. That brief suggested that "courts should be required to consider whether a particular award is rationally related to the goals of deterrence and punishment." Brief *Amici Curiae* for the American Council of Life Insurance, et al., in No. 93-644 (filed

Feb. 28, 1994) at 13-14. Further, Dean Griswold urged that "to ensure that courts consult something other than their own preconceptions in evaluating the rationality of such awards, courts should be required to consider certain objectively measurable indicia of what amounts are reasonably necessary to serve the goals of deterrence and punishment," in the form of "a non-exclusive list of factors" for courts to consider in analyzing the rationality of an award. *Id.* at 14. This Court took that course two years later in *BMW v. Gore*.

B. The "Rational Factfinder" Standard is Easily Administrable in the Punitive Damages Context

In sum, a considerable body of precedent holds that when a criminal or civil litigant has lost a jury trial and has failed on all *procedural* objections to the trial (e.g., claims of evidentiary or instructional error), on appeal the litigant's objection to the *substance* of the jury's holding — whether on liability or damages — should be evaluated under a "rational factfinder" standard, with all reasonable inferences drawn in favor of the jury's verdict, thereby leaving the evaluation of the weight of the evidence to the jury (through its verdict) and the trial judge (through his or her "thirteenth juror" role on posttrial motions).[8]

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[8] One of Cooper's *amici* argues that the "rational factfinder" standard of appellate review that *amicus* advocates would somehow strip a federal district court of its power, "in disposing of a Rule 59 motion, . . . to reweigh the evidence, drawing its own inferences and assessing witness credibility." Railroads Br. at 25. To the contrary, the *amicus* brief at the certiorari stage explicitly noted that the use by federal appellate courts of the "rational factfinder" review standard leaves undisturbed the district courts' "broad authority to grant new trials, both as to liability and damages, through the exercise of their power to sit as the 'thirteenth juror,' weighing the evidence to decide whether a new trial is in the interests of justice." Cert. *Amicus* Br. at 14 n.7. The strong concern expressed therein with ensuring that the federal appellate courts *do not* unduly interfere with the district courts' exercise of their "thirteenth juror" role is illustrated by the citation to the brief that *amicus* and other scholars submitted to this Court in *Gasperini*, arguing that the power to alter jury verdicts based on a weight-of-the-evidence analysis is exclusive

In an effort to exempt the field of punitive damages from the operation of this traditional, commonsense review standard, Cooper's *amici* rely on dicta in this Court's decision in *Tull v. United States*, 481 U.S. 412, 425-27 & n.9 (1987), to suggest that a jury's decision about how much in punitive damages is needed to deter and punish a defendant's wrongdoing is too "highly discretionary" to count as a "factual" finding that need be made by a jury at all, or that can be meaningfully assessed under a "rational factfinder" standard. Railroads Br. at 10-11; PLAC Br. at 25 & n.10. But this *Tull* dicta would appear to be irrelevant in light of this Court's decision in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), not addressed by Cooper or its *amici*. In *Feltner* this Court recognized that historically "cases involving discretionary monetary relief," including punitive damage cases, "were tried before juries," and it stated that the *Tull* holding was limited to the determination of "the amount of civil penalties to be paid to the Government." *Id.* at 353, 355 (citing *Coryell v. Colbaugh*, 1 N. J. L. 77 (1791)). *See also* Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 Nw. U. L. Rev. 153, 154-56, 159-71, 176-86, 198-203 (1999).

The idea that it is somehow difficult to treat a jury award of punitive damages as a "factual" finding that is properly scrutinized by asking whether a rational factfinder could have awarded that amount on the record of the case, in light of the purpose of punitive damages to deter and punish wrongful conduct, is belied by actual litigation experience. As already noted, this Court and lower federal appellate courts have had no difficulty reviewing objections in particular cases that a given punitive damage award is grossly excessive in light of the trial court record and applicable legal guidelines, even after drawing all reasonable inferences in favor of the jury's verdict. See pp. 3, 11-12, *supra*.

The ease by which defendants can articulate a concise and coherent attack on the rationality of a given punitive damages

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to district judges and is effectively immune from control by appellate courts. *Id.* (citing *Gasperini Amicus* Br., *supra* note 6, at 4-11, 22-24).

verdict is illustrated by the argument that Exxon Corporation has made concerning the $5 billion in punitive damages awarded against it by a jury in the litigation brought by private parties in the aftermath of the *Exxon Valdez* oil spill. That award, which is currently on appeal in the Ninth Circuit, appears to be by far the largest punitive damage verdict ever appealed within the federal system. Exxon's appellate argument that the award is grossly excessive in violation of federal substantive due process is carefully focused on the issue of whether the award is *rational* on the record of the case, an argument that it forcefully advanced in only 40 pages of appellate briefing.[9] In making this argument, in its opening brief Exxon invoked this Court's holding "that punitive damages should be 'reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.'"[10] In the first sentence of its reply brief, Exxon stated that it was invoking "the most basic legal requirement for punitive damages — that an award must be rationally related to society's purposes of deterrence and punishment."[11]

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[9] *See* Joint Opening Brief of Appellants Exxon Corporation and Exxon Shipping Company in *Baker v. Exxon Corporation* in 9th Cir. No. 97-35191 (filed June 30, 1997) at 26-31, 68-77; Joint Reply Brief (filed October 16, 1997) at 1-2, 23-26, 42-59.

[10] Joint Opening Brief at 26 (quoting *Haslip*, 499 U.S. at 9-12, 21-23, and citing *BMW v. Gore*, 116 S. Ct. at 1595).

[11] Joint Reply Brief at 1. The thrust of Exxon's argument is that its actions in connection with the oil spill amounted at most to a non-intentional tort, from which it did not profit but to the contrary had suffered a net $3.5 billion loss in cleanup costs, civil liabilities, criminal sanctions, and other expenses. Exxon argues that to force it to pay an additional $5 billion in punitive damages to plaintiffs who had suffered disruption caused by the oil spill (the environmental damage was excluded from consideration, having been addressed in earlier legal proceedings) could not rationally advance any legitimate objective of deterrence or punishment.

In particular, Exxon contends that the objective of deterrence was fully achieved by its incurring of $3.5 billion in spill-related costs, which plaintiffs

C. Due Process is More Than Satisfied By Appellate Review of Whether a Jury's Verdict is Rationally Supported on the Record Under Substantive Law

Apparently in support of its suggestion that the use of a "rational factfinder" review standard of appellate review would be unduly deferential to jury verdicts, one of Cooper's *amici* argues that due process requires "meaningful judicial scrutiny" on appeal. Chamber of Commerce Br. at 1-2. If construed to mean that due process compels an appellate court to do something more in a criminal or civil case besides ask itself if the result reached by the jury is rational based on the record evidence and pertinent legal considerations, this argument would entail sweeping consequences. This Court has never held that due process affords litigants any right of appeal at all. "[I]t is well settled that there is no constitutional right to an appeal," even in a criminal case. *Abney v. United States*, 431 U.S. 651, 656 (1977) (citing *McKane v. Durston*, 153 U.S. 684 (1894)). "[I]t was 100 years [after the founding of this nation] before the *defendant* in a criminal case, even a capital case, was afforded

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had "virtually concede[d]" was itself "enough to deter anyone from anything" (as the United States and the district court had agreed in earlier proceedings), deterrence that was confirmed by the fact that Exxon had already made sweeping changes in its operations in an effort to minimize the risk of similar accidents in the future. Joint Opening Br. at 27-28, 30-31; Joint Reply Br. at 1, 24-25. As to the objective of punishment, Exxon argues that this objective was fully satisfied by the imposition against Exxon of $125 million in criminal fines and restitution, "more than twice the aggregate of *all* amounts previously paid in criminal proceedings for environmental crimes," an amount that "represented the considered judgment of the Attorneys General of the United States and Alaska, speaking for the public, concerning what was necessary to achieve society's purposes of punishment and deterrence." Joint Opening Br. at 27-29. *See also* Joint Reply Br. at 25-26 (arguing that "the officials authorized to express and vindicate society's norms have already done so," with the consequence that "[t]he jury verdict here does not express society's official condemnation of Exxon; rather, it overturns the balanced judgment society made through its authorized representatives, and imposes a punishment 200 times greater than the criminal fine the real Attorneys General found appropriate and the court imposed").

appellate review as of right." *Carroll v. United States*, 354 U.S. 394, 400 & n.9 (1957) (summarizing the legislation creating a right of appeal). This initiative was quickly adopted in many states, but even today it appears that two states deny an appeal of right in criminal cases. *See In re Hamel*, 629 A.2d 802, 804 (N.H. 1993); *State v. Cooper*, 498 A.2d 1209, 1213-16 (N.H. 1985); *State v. Rogers*, 434 S.E.2d 402, 405 (W. Va. 1993).

Likewise, in civil cases, for the first 159 years of this nation's history, § 22 of the Judiciary Act of 1789 and its successors allowed appeal only on a "writ of error." *See* 1 Stat. 84 (1789); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 61-62, 101-05 (1923). As *amicus* and other scholars summarized at length in *Gasperini*, in numerous decisions prior to 1948 (when the relevant statutory language was omitted from the judicial code) this Court repeatedly refused to review claims by civil litigants that a jury's damage award was either inadequate or excessive. *See Gasperini Amicus* Br., *supra* note 6, at 6-11, 22-24.

In its punitive damages decisions during the past decade, and in its *Gasperini* decision, this Court has authorized federal appellate review of the size of jury verdicts under the "rational factfinder" standard, conducted on the record of the case with all inferences drawn in favor of the verdict, in light of applicable substantive law. This is the same standard of appellate review used in other areas of litigation, both criminal and civil, to measure a jury verdict's conformity with applicable law. There is no basis for any suggestion that the "rational factfinder" standard of review fails to comport with due process. As the respondent in *Oberg* pointed out without contradiction, to hold that the "rational factfinder" test does not satisfy due process would effectively constitutionalize weight-of-the-evidence review, seriously disrupting criminal and civil litigation nationwide. *See* Brief of Respondent in No. 93-644 (filed Apr. 1, 1994) at 14, 17 n.17, 38-50.

II. ANY FEDERAL APPELLATE REVIEW OF JURY FACTFINDING LESS DEFERENTIAL THAN THE "RATIONAL FACTFINDER" STANDARD IS CONSTITUTIONALLY AND STATUTORILY BARRED

In addition to the above considerations, the argument of Cooper and its *amici*, founded largely on the Third Circuit's *Inter Medical Supplies* decision, that federal appellate courts should engage in "rigorous" review of punitive damage awards, exhibiting little if any deference to the jury, see pp. 4 & n.3, *supra*, conflicts with fundamental strictures on the scope of federal appellate review. By definition, an appellate court that does not limit itself to the issue of whether a rational factfinder could have reached the jury's result, on the trial record and under applicable law, must be engaging in weight-of-the-evidence review or *de novo* review of the factual issue of what is the proper amount of punitive damages in a particular case.[12]

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[12] Substantively there are only three review standards that a judge can employ in reviewing a jury's verdict: review of whether the jury's result is *rational* on the record, review of whether the jury's result is supported by the judge's own assessment of the *weight* of the evidence, and *de novo* review of whether the judge would have reached the precise result reached by the jury, had he or she been the factfinder. *See* Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 Cornell L. Rev. 1115, 1126-27 (1987). The "rational factfinder" test does not involve any sort of weight-of-the-evidence review of the jury's verdict. In *Tibbs v. Florida*, 457 U.S. 31 (1982), the Court stated that the *Jackson* test "forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt," so that "[t]he Due Process Clause . . . sets a lower limit on an appellate court's definition of evidentiary sufficiency," but it emphasized that "the reviewing court must view 'the evidence in the light most favorable to the prosecution.'" *Id.* at 45 & n.21 (quoting *Jackson*, 443 U.S. at 319). *See also Herrera v. Collins*, 506 U.S. 390, 402 (1993) (review under *Jackson* "does not focus on whether the trier of fact made the *correct*" decision, "but rather whether it made a *rational* decision"); *Burks v. United States*, 437 U.S. 1, 16 (1978) ("Even the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal"). Thus, it would appear that by rejecting the "rational factfinder" standard, Cooper and its *amici* must be embracing the proposition that a federal appellate court may engage in weight-of-the-evidence review (or even de novo review) of a jury's punitive damages verdict.

As *amicus* and other scholars explained in *Gasperini*, this form of federal appellate review is entirely improper. Appellate weight-of-the-evidence or *de novo* review of jury verdicts has been barred by statute since the enactment of the Judiciary Act of 1789, § 22, 1 Stat. 84-85, to the present day, *Gasperini Amicus* Br., *supra* note 6, at 22-24, a statutory structure which is both compatible with basic fairness to litigants and which promotes efficiency. *Id.* at 24-30. Even more fundamentally, the sort of intensive review of jury verdicts advocated by Cooper and its *amici* has been barred by the Re-Examination Clause of the Seventh Amendment since the enactment of the Bill of Rights in 1791. *Id.* at 4-21. As *amicus* has argued previously:

> This Court has repeatedly held that the question of the adequacy of the evidence to support a damage award is "purely a question of fact," not a legal issue. Weight-of-the-evidence review simply gives an appellate court the opportunity to substitute *its* view of the evidence for that of the jury, not to correct any kind of defect in the proceeding. By definition, the award is one that a rational jury could reasonably have imposed; its only "flaw" is that a federal appellate court disagrees with it.

Id. at 19 (quoting *Metropolitan R.R. v. Moore*, 121 U.S. 558, 574 (1887), and citing *St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 661 (1915)).

According litigants the right to appellate weight-of-the-evidence review would impose on appellate courts in every case the burden "to examine in some detail all of the evidence," rather than simply to confirm that the jury's result is supported by "adequate evidence in the record." *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1199 (2d Cir. 1995) (Newman, J.). This would duplicate work already competently done by trial judges and inevitably undermine confidence in trial judges. *See* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 781-82 (1957). And by encouraging disappointed litigants to appeal in an effort to re-try the facts, it would lead to greater docket congestion and less time for attention to serious issues of law. *See* Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 Tex. L. Rev. 949, 967-68 (1964); *see also* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure: Civil 2d* § 2819, at 204 (2d ed. 1995).

In *Gasperini*, the Members of this Court disagreed over whether the constraints of a New York tort-reform statute governing damages could reasonably be construed as imposing a substantive legal limit on damages (that is, although not a preset cap, what amounted to a "soft cap" dependent in part on the facts of the case) that could be applied by the district court, followed by appellate review for "legal" error under an abuse-of-discretion standard. But as *amicus* reads the *Gasperini* opinions, no Member of the Court disputed that the Seventh Amendment bars a federal appellate court from engaging in weight-of-the-evidence review. The dispute in *Gasperini* was simply over whether the New York statute should be viewed by federal district courts as imposing a "soft cap," with federal appellate courts properly policing the outer boundaries of district court rulings applying this cap, or whether instead such a framework for review would invariably draw federal appellate courts into the prohibited enterprise of engaging in weight-of-the-evidence second guessing of jury verdicts. *See Gasperini*, 518 U.S. at 434-38 (opinion of the Court) (viewing New York statute as

imposing substantive cap, applicable in district court and therefore reviewable on appeal); *id* at 442-47 (Stevens, J., dissenting) (viewing New York statute as prescribing "an objective, legal limitation on damages" with the district court's analysis and therefore reviewable on appeal as a matter of law); *id*. at 448-50, 460-469 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (viewing any appellate application of the New York statute as requiring weight-of-the-evidence review that is prohibited by the Seventh Amendment).

Under *Gasperini*, the invalidity under the Seventh Amendment of the "intensive review" standard used by the Third Circuit and advocated by Cooper and its *amici* is clear. By contrast, it would appear (especially in light of *Gasperini*) that the "rational factfinder" standard of review for punitive damages followed by most circuits is compatible with the Seventh Amendment. Thus, in *Gasperini*, *amicus* and other scholars confined their argument to a demonstration of the impermissibility of any weight-of-the-evidence review in civil cases by federal appellate courts, raising no question as to "whether federal appellate courts have the power to review the arguably legal question of a damage award's compliance with the substantive due process 'reasonableness' standard." *Gasperini Amicus* Br., *supra* note 6, at 20 & n.19 (citing *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994), and *Southern Ry. v. Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.)).

CONCLUSION

When a criminal or civil litigant has lost a jury trial and has failed on all available procedural objections to the trial, appellate review of the substance of the jury's finding has traditionally been sharply limited, so as to leave to the jury and trial court the role of evaluating the weight of the evidence. This Court should apply in the punitive damages context the standard of appellate review that traditionally has been used in both criminal and civil litigation when one party argues that the result reached by the jury is not sustainable under the relevant law on the particular record of the case: the "rational factfinder" standard.

Respectfully submitted.

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APPENDIX

QUALIFICATIONS OF *AMICUS CURIAE*

Arthur F. McEvoy is the J. Willard Hurst Professor at the University of Wisconsin Law School, where he teaches American legal history. He has published extensively in the fields of American history and American legal history. He was a professor of history at Northwestern University from 1980 to 1993, and a Research Fellow at the American Bar Foundation from 1989 to 1994. He has a particular interest in the history of judicial review of jury verdicts in the United States, and was lead counsel on an *amicus* brief filed by legal historians on that issue that was cited by this Court in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 422 n.2 (1994).